



## Drink driving defence – alcohol consumption was after driving

**Date: Monday February 14, 2022**

If a person is charged with drink driving pursuant to s79 *Transport Operations (Road Use Management) Act 1995*, the prosecution must prove that the person drove a motor vehicle and that at **the time of driving**, the person was under the influence of alcohol. Proving the offence can become much more difficult for the prosecution if a person is breath-tested at a time when the person is no longer driving.

Ordinarily, a charge of drink driving is easily proven by the prosecution in circumstances where, for example, a person who is driving:

- is pulled over by police;
- is required to provide a specimen of breath or blood for testing; and
- returns a result that is higher than the allowed blood alcohol concentration.

## What if a person is not breath tested at the actual time of driving?

A common example of this is where a person who is involved in a motor vehicle accident consumes liquor *after* the accident (to, for instance, calm their nerves), and is breath-tested at a location and time post-accident (as opposed to at the accident scene).

In scenarios like this, if the charge is defended at a hearing, the onus is on the prosecution to prove beyond reasonable doubt that despite the breath-test being performed after the defendant had stopped driving, the defendant was nonetheless under the influence *at the time of driving*.

Examples of successful defence of drink driving where testing was *after driving*

### *Davies v Dorfler, ex parte Davies* [1988] 2 Qd R 490

Dorfler was charged with drink driving. At the hearing in the Magistrates Court, she gave evidence that she had an accident and that after the accident, she had consumed four glasses of wine. She denied having consumed alcohol prior to driving.

The prosecution did not adduce any evidence that she had in fact been under the influence at the time of the accident. They had no evidence to contradict her version that she had consumed the alcohol *after* driving.

Dorfler was originally convicted, but on appeal, the Supreme Court commented that:

*'...it did not appear from any evidence adduced by the prosecution that the accused had the requisite blood alcohol concentration at the time when she drove the motor vehicle.'*

In overturning the conviction, the Court said:

*'...since it was accepted in this case that there was no evidence that the accused was under the influence of liquor while she was driving the motor vehicle, she should have been acquitted of the charge.'*

### *Leach v Commissioner of Police* [2009] QDC 066

Leach pleaded not guilty to, but was convicted of, two charges – one of which was driving under the influence of liquor.

Leach was involved in an accident and approximately 1.5 hours later, was breath-tested. His evidence was that he had consumed some alcohol prior to driving (one beer or one glass of champagne) and that following the accident and upon returning home, but before being breath-tested, he consumed a bottle (perhaps more) of champagne.

On appeal, the Court followed the *Davies v Dorfler* decision, finding that the prosecution could not prove that Leach was under the influence at the time of driving and that in light of his admissions to the consumption of alcohol post-driving, the evidence did not establish he was under the influence at the material time. The appeal was allowed, and the conviction set aside.

**Get help from a traffic lawyer**

What these cases show is that proving drink driving charges is not always clear-cut. Depending on the circumstances, there may be scope to defend a charge.

If you or someone you know has been charged with drink driving in similar circumstances, we recommend that you contact us so that we can advise you of your options, including any possible defences to the charge.

## Contacting Gilshenan &Luton

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